

***United States Court of Appeals
for the Second Circuit***



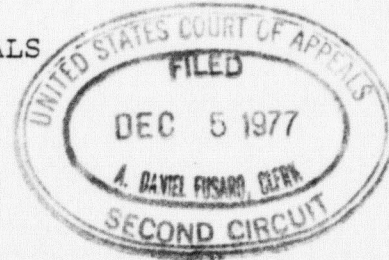
**BRIEF FOR
APPELLEE**

77-6152

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77-6152

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT



No. 77-6152

HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., MISERICORDIA HOSPITAL MEDICAL CENTER and BUFFALO GENERAL HOSPITAL, THE GENESEE HOSPITAL, and THE MOUNT SINAI HOSPITAL on behalf of themselves and all other nonprofit hospitals which are members of the HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., and which are reimbursed for Medicaid Services rendered to hospital patients,

Plaintiffs-Appellants,

v.

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, ROBERT P. WHALEN, as Commissioner of Health of the State of New York, PETER GOLDMARK, as Director of the Budget of the State of New York, HUGH L. CAREY, as Governor of the State of New York,

Defendants-Appellees,

and

F. DAVID MATHEWS, as Secretary of the United States Department of Health, Education and Welfare,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF STATE DEFENDANTS-APPELLEES

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PHILIP L. TOIA, et al.,
Defendants-Appellees,
and
DAVID MATHEWS, as Secretary of the U.S. Department of
Health, Education and Welfare,
Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF STATE DEFENDANTS-APPELLEES

STATEMENT OF ISSUES PRESENTED

1. Whether the retroactive repeal of the federal statute requiring, as a condition to full Medicaid funding, that states consent to suits against them for monetary relief concerning reimbursement rates for in-patient

Medicaid services should be given effect in a case pending at the time the repeal was enacted.

2. Whether in this case there was a non-statutory waiver by New York of its Eleventh Amendment immunity from suit.

3. Whether withdrawal of a non-final order for monetary relief on the basis of a subsequently adopted repealer statute deprives plaintiffs of constitutionally protected rights.

4. Whether the District Court had discretion not to order restoration to the state of funds received pursuant to a prior order withdrawn for lack of jurisdiction.

5. Whether the orders granting monetary relief against the State constituted an improvident exercise of equity jurisdiction.* /

REFERENCES TO PARTIES AND RULINGS

This is a class action on behalf of all public and voluntary hospitals in the State of New York against the Governor and other officials of New York and the

* / This is an alternative ground that has been briefed previously and is not discussed herein. See page 59 below.

Secretary of HEW. By orders entered August 2 and November 9, 1976 (J.A. 428-31, 566),^{*/} District Judge Morris E. Lasker ruled that certain changes in the formula for computing rates for in-patient medical services provided by the hospitals under the Medicaid program could not be applied prior to HEW approval. Judge Lasker ordered the state defendants to recompute in accordance with the previously approved formula the rates for services rendered on and after January 1, 1976, and to reimburse the hospitals at the recomputed rates until HEW approval of the formula changes. (J.A. 430-31).

On appeal, this Court remanded the case to the District Court to determine whether a recent Act of Congress repealing retroactively an earlier statutory requirement that states waive their immunity from suits of this kind was applicable, and if so, whether its application would impair constitutional rights of the hospitals arising from that court's prior award of monetary relief. (J.A. 631-34).

On August 4, 1977, Judge Lasker determined that the repealer statute was applicable to the present case and that the prior award of monetary relief was barred by the Eleventh Amendment. He further concluded that application of the repealer statute to this

^{*/} The Joint Appendix is cited as "J.A. ____."

case did not deprive the hospitals of any constitutional rights. (J.A. 684-716). By order dated August 15, 1977, Judge Lasker vacated his earlier orders to the extent they awarded monetary relief against the state and ordered restoration to the state of funds received by the hospitals pursuant to the earlier orders. (J.A. 763-64). The August 15 order (as modified on September 14, 1977 (J.A. 739)) is the subject of this appeal.

STATEMENT OF THE CASE

The District Court's opinion contains a complete and accurate statement of the facts pertinent to this appeal. (J.A. 686-92). The following statement, submitted in accordance with Federal Appellate Rule 28(b), closely conforms to the District Court's statement.

A. Background.

New York participates in the Medicaid program authorized by Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq. This joint federal-state program is administered by the state pursuant to the Act and HEW regulations. Funds are supplied by federal, state and local governments to reimburse providers of services. Certain aspects of a state's program must be embodied in its "State Plan," which is subject to approval

by HEW. Section 1902(a)(13)(D) (42 U.S.C. § 1396a(a)(13)(D)) requires that providers be paid the reasonable cost of in-patient hospital services determined in accordance with methods and standards included in the plan after approval by the HEW Secretary.

Since January 1, 1970, New York has employed a prospective reimbursement methodology for calculating rates for hospital in-patient services. This methodology has been approved by HEW and is based upon predicted costs rather than a retrospective formula. In 1976, faced with rapidly increasing Medicaid costs and becoming increasingly aware of the need to eliminate excessive and unnecessary hospital expenditures, New York undertook substantial revisions in its formula for reimbursing in-patient hospital services. A revised formula was promulgated on July 1, 1976, which incorporated several major changes, including lowering the ceiling on routine in-patient costs and imposing, for the first time, a ceiling on so-called ancillary in-patient costs.^{*/}

These changes, contained in 10 N.Y.C.R.R. §§ 86.14(b), 86.21(k), and 86.26, were submitted to HEW for its review. On August 16, 1976, HEW approved sections

^{*/} The state also took certain steps concerning out-patient costs that are not at issue in the present appeal.

86.14(b) and 86.21(k). It approved section 86.26 on October 4, 1976.

New York publishes hospital reimbursement rates on an annual basis. Because changes to its methodology were under consideration at the start of 1976, the state published interim reimbursement rates, generally the same as 1975 rates, pursuant to which it reimbursed hospitals for in-patient services from January 1, 1976, until the amended regulations were published on July 1, 1976. Thereafter, it recalculated rates for the period January 1, 1976, using the new reimbursement formula. (J.A. 687-88).

B. The Proceedings Below.

On May 5, 1976, the Hospital Association of New York State, Inc. (HANYS), and other named plaintiffs filed suit seeking declaratory and injunctive relief from the interim rates then in effect for in-patient and out-patient hospital services. (J.A. 6-16). Jurisdiction was predicated on general federal jurisdiction statutes and on section 111 of Public Law 94-182 (89 Stat. 1054), effective January 1, 1976. (J.A. 10). This statute required states to waive their Eleventh Amendment immunity from suits by providers respecting reimbursement rates for in-patient hospital services or suffer a ten percent reduction in

their federal Medicaid funds. Pursuant to the statute, but under protest, New York had executed such a waiver. (J.A. 3-5).

After the state published its revised in-patient reimbursement formula on July 1, 1976, the complaint was amended to challenge the new reimbursement methodology and a preliminary injunction was sought against implementation of the revised methodology. (J.A. 481-504). The District Court entered an order on August 2, 1976, declaring that 10 N.Y.C.R.R. §§ 86.14(b), 86.21(k), and 86.26 were unlawful until approved by HEW and permanently enjoining their application to plaintiffs until HEW approved them. The order further directed the state to recalculate the hospitals' in-patient reimbursement rates pursuant to the pre-existing HEW-approved formula for the period beginning January 1, 1976, and pay the hospitals in accordance with the recalculated rates until HEW approved the new formula. (J.A. 428-31).

Although the state defendants had raised the defense that the Eleventh Amendment barred the order for recalculation and additional payment of rates for the past period, Judge Lasker relied on the consent-to-suit that the state had executed under protest to comply with section 111 of Public Law 94-182 and rejected the

state's argument that this forced waiver was unconstitutional. (J.A. 418-21).

The August 2, 1976, order of Judge Lasker took effect August 16, 1976.^{*/} However, on that day HEW approved the principal regulations in issue, 10 N.Y.C.R.R. §§ 86.14(b), 86.21(k), thus precluding any future impact of the August 2 order as to them.^{**/} A stay motion came on for hearing before this Court on August 17, 1976, and at that time the Court remanded the case to Judge Lasker to determine whether the HEW approval was retroactive to January 1, 1976. (J.A. 690).

While that issue was under consideration by Judge Lasker, Congress repealed, retroactive to January 1, 1976, the consent-to-suit requirement that had been adopted effective that date in Public Law 94-182.^{***/} Shortly thereafter, on November 9, 1976, Judge Lasker ruled that HEW approval had prospective effect only and ordered the state defendants to comply with his August 2 order. (J.A. 561-68). The state's efforts to

^{*/} Judge Lasker stayed his judgment for 12 days. Since August 15, 1976, was a Sunday, the order became effective on August 16, 1976. Fed. R. Civ. P. 6(a); In re Moir Hotel Co., 248 F.2d 454 (7th Cir. 1957).

^{**/} Section 86.26 was approved by HEW on October 4, 1976.

^{***/} The President signed the Act containing the repealer on October 18, 1976. The texts of the repealer and of the repealed section 111 of Public Law 94-182 are set forth in Appendix A.

secure a further stay were unsuccessful before Judge Lasker and this Court, and the state has made the payments to hospitals for the January 1 through August 15, 1976, period in accordance with the orders of the District Court.

Those orders were appealed to this Court which, on March 16, 1977, remanded the case to the District Court to determine whether the repealer statute applied to this case and, if so, whether withdrawal of the monetary relief previously awarded against the state would impair the hospitals' constitutional rights. (J.A. 631-34).

The decision on remand, entered August 4, 1977, held: (1) that New York's statutory waiver of its Eleventh Amendment immunity was not "voluntary" in the usual constitutional sense, but was made only "because Congress required and intended to require such a waiver as a condition to the receipt of federal funds" (J.A. 701); (2) that the repealer governed cases pending at the time of its adoption, since Congress intended by the repealer to undo altogether the effects of its earlier requirement (J.A. 698); (3) that the state had made no "non-statutory" waivers of its Eleventh Amendment immunity (J.A. 701-02); (4) that the repealer statute requires vacation of the earlier orders and dismissal of claims for

monetary relief against the state defendants (J.A. 703); (5) that plaintiffs had acquired no vested right in the earlier orders that would render application of the repealer legislation to this case unconstitutional (J.A. 713); and (6) that vacation of the earlier orders would work no "manifest injustice" on the hospitals (J.A. 715).

By order of August 15, 1977, as modified September 14, 1977, the District Court vacated its August 2 and November 9, 1976, orders and dismissed the complaint insofar as they involved monetary relief against the state defendants. (J.A. 763, 789). This appeal followed.

SUMMARY OF ARGUMENT

1. The purpose of the 1976 repealer legislation, reflected both in its terms and its legislative history, was to undo completely the effects of the consent-to-suit requirement adopted in late 1975. In this case, the Congressional purpose can be given effect only by withdrawal of the previous orders for monetary relief that were predicated upon the state's forced consent-to-suit. This result is supported by the venerable doctrine that changes in federal court

jurisdiction are to be given effect in pending cases. A contrary result would unfairly expose New York to fiscal liabilities faced by no other state solely because it, unlike many states, complied (though under protest) with the forced consent-to-suit requirement.

2. Contrary to contentions of the hospitals, there has been no "judicial waiver" of immunity by the state, which throughout this litigation has steadfastly asserted its Eleventh Amendment rights.

3. Application of the repealer legislation to vacate the prior orders for monetary relief impairs no constitutionally protected rights of the hospitals. Many recent decisions of the Supreme Court and the lower federal courts confirm that a plaintiff obtains no vested rights in a judgment that has not become final, and that a non-final judgment is always subject to vacation if the Congress removes the jurisdiction of the federal court in the case. The one 19th century case relied upon primarily by the hospitals, which did not involve federal court jurisdiction, was treated as an effort to obliterate underlying legal rights. By contrast, the hospitals here retain all remedies they had before the enactment of the forced consent-to-suit statute.

In addition, of the two vacated orders, one was issued while Congressional repeal of the consent-to-suit requirement was well in process and the other did not issue until the repealer had become law. Under the circumstances of this case, the hospitals can claim no interest of constitutional dimension in the vacated orders.

4. Because the repealer legislation removed the jurisdiction to award monetary relief, the court properly concluded that it was required to order restoration to the state of funds paid pursuant to the orders. In any case, refusal to order restoration would be inequitable, for restoration leaves the hospitals with compensation for 1976 Medicaid services in accordance with the formula found by HEW to have met the statutory reasonable cost reimbursement requirement.

ARGUMENT

- I. THERE HAS BEEN NO WAIVER BY THE STATE OF ITS ELEVENTH AMENDMENT IMMUNITY FROM SUIT THAT WOULD SUSTAIN MONETARY RELIEF TO THE HOSPITALS.

The Eleventh Amendment to the Constitution immunizes states and their officials from unconsented suits seeking relief for the past (as opposed to injunctive or declaratory relief for the future). Edelman v. Jordan, 415 U.S. 651 (1974). The initial relief ordered by the District Court in this case -- which required the state to recompute the reimbursement rates for hospitals for a past period and to make payments to the hospitals in accordance with those recomputed rates -- is the kind of relief for the past that is within the Eleventh Amendment bar. Id. at 668. Thus, it could be justified only on the basis that the state's immunity had been waived. Here the only waiver was the consent-to-suit that the state had given under protest and solely in response to the statutory waiver requirement. Since that requirement was repealed retroactively and there is no other basis for finding a waiver of state immunity, the District Court was correct in concluding that the order of monetary relief should be withdrawn, the complaint dismissed to the extent it sought such relief, and the funds paid pursuant to the order restored to the state.

A. The Forced Waiver of the State's
Immunity Did Not Survive the Retro-
active Repeal of the Federal Consent-
To-Suit Requirement.

In late December 1975, Congress enacted Public Law 94-182, effective January 1, 1976, which included a provision requiring states participating in the Medicaid program to consent to suits by providers of in-patient hospital services concerning their reimbursement for Medicaid services, and to waive any immunity from suit under the Eleventh Amendment or otherwise (§111(a)). This statute also imposed a penalty of ten percent of their federal share of Medicaid funds on states that failed to execute the required consent-to-suit. (§111(b)). The legislation was adopted very hastily in the last two days of the Congressional session, without hearings or committee consideration and with only perfunctory floor discussion, as an amendment to a bill covering other matters. See 121 Cong. Rec. H13056 and S23055 (daily ed. Dec. 19, 1975), H12975 (daily ed. Dec. 18, 1975). The law provoked an immediate and widespread adverse reaction, and efforts to repeal it were instituted early in the 1976 session. H.R. Rep. No. 94-1122, 94th Cong., 2d Sess. (1976), p. 4. The House voted for repeal in May 1976, the Senate later concurred, and the President signed the repealer (Pub. L. No. 94-552) on October 18, 1976.

The repealer statute has two provisions. The first repeals both the consent-to-suit requirement and the penalty, for those states not executing the consent-to-suit, of loss of a portion of federal Medicaid funds. The second section provides that "the amendments made by the first section shall take effect as of January 1, 1976." The repealed statute (Pub. L. 94-182, § 111) carried an effective date of January 1, 1976. Thus, the repealer statute plainly sought to undo entirely what was done by section 111.

In the decision under review, the District Court confirmed its earlier finding that New York's consent-to-suit had been filed under protest and solely in response to the federal mandate. (J.A. 689). Based on the terms of the repealer, its background and legislative history, and the pertinent precedents, the Court concluded that the legislation removed the jurisdictional basis for relief as to the past against states generally (a point not now contested by the hospitals), and that it was intended to reach cases pending at the time the repealer was adopted. As the District Court put it, "Congress' intent in enacting the forced waiver provision and in repealing it was to expand and contract, respectively, the district court's jurisdiction over suits by Medicaid providers against the

states." (J.A. 698). The Court's reading of the statute, the legislative history and the relevant cases is sound and persuasive, and its conclusion that the statute applies to pending cases is beyond dispute.

1. Terms Of The Repealer Statute

The terms of the repealer legislation are not ambiguous on its application to pending cases. The initial consent-to-suit statute had two provisions -- one imposing the consent requirement and the other imposing the ten percent penalty for non-complying states. The repealer statute identified both provisions and repealed both. It further provided that the repeal of both would be effective as of January 1, 1976, the date they originally took effect. Thus, by its terms the repealer sought to undo all effects of the original statute. This result can be achieved only by applying the repealer to cases pending when it was enacted.

As part of their argument (discussed below) that the primary purpose of the repealer was to avoid penalties against non-complying states, the hospitals contend that it was necessary to repeal both provisions of section 111 retroactively to avoid sanctions against non-complying states. (Pl. Br., p. 35). This is incorrect. Retroactive repeal of the ten percent penalty removed the only available

penalty for past non-compliance. The general non-compliance sections of the Medicaid Act permit a sanction only to the extent that a state is not presently complying with applicable requirements. See Social Security Act § 1904(a), 42 U.S.C. § 1396(c). Thus, retroactive repeal of the consent-to-suit provision was not necessary to avoid a sanction against non-complying states. Its sole function was to undo any effect that the consent-to-suit may have had in those states where the consent had been executed.

2. Legislative History

The legislative history of the repealer strongly supports the conclusion that it should be applied in pending cases. That the aim of the repealer was to undo fully the effects of the original statute is graphically described by comments of Congressman Carter of Kentucky, a supporter of the bill, in the House debate (122 Cong. Rec. H4280 (daily ed. May 12, 1976)):

"The purpose of this legislation is to correct the mistake which was made on the last day of the session -- December 19 -- when this whole problem was created.

"At that time a bill was rushed to the floor, and this consent provision was added with neither House nor Senate committee consideration. Had the responsible committees been given the opportunity to examine this legislation and hold hearings, it would have become apparent that . . . that was not a good way to legislate.

"It is neither responsible nor proper to wait until the end of the session -- and then to consider legislation with such haste."

The hospitals argue that the sole, or at least primary, purpose of the repealer was to avoid the ten percent penalty for those states that failed to execute the required consent-to-suit. (J.A. 694; Pl. Br., pp. 34-35). But as the District Court found (J.A. 694-96), the legislative history supports the conclusion drawn from the terms of the repealer statute that Congress was moved by broader purposes. Both the Senate and House Reports accompanying the repealer legislation evidence Congressional concern over the undesirability, and possible unconstitutionality, of suits for money damages against the states resulting from the hastily enacted waiver provision. They reflect, in the words of the court below, a "pressing desire" to preclude such suits. (J.A. 698).

In the Report of the House Committee on Interstate and Foreign Commerce, H.R. Rep. No. 94-1122, 94th Cong., 2d Sess., May 11, 1976, the first reason given in support of the repealer legislation was the desire to protect the rights of states that had, under protest, executed the waivers and to prevent interference with the administration of the Medicaid program by provider suits against those states:

"[I]n an effort to deal with a particular situation which had arisen in one or two States [freezes on Medicaid rates unapproved by the Secretary], a provision was adopted which now requires all States to waive one of their basic rights -- immunity to suit. Further it required them to waive their immunity to suit on all questions relating to the payment of the reasonable cost of in-patient hospital services The Department of Health, Education and Welfare, the Governors and Attorneys General of the States are all concerned that the result will be an unreasonable burden of suits which will be costly in terms of time and legal manpower, and which will make efficient program administration virtually impossible." H.R. Rep. No. 94-1122, 94th Cong., 2d Sess., May 11, 1976, at 4.*/

Two additional reasons for the retroactive repeal given in the House Report were the desire to prevent the imposition of a substantial penalty on states that had refused to comply with the waiver provision "because of their strong concern about the advisability of waiving their immunity," and the "serious questions . . . raised concerning the constitutionality of the provision." Id. at 5. While the House Report recognized that existing

*/ Plaintiffs contend that use of the future tense "will be" in the Report evidences an intent to affect only future rather than pending lawsuits. The District Court properly characterized this as "based on too slender a reed to warrant relief." (J.A. 697). Since Congress was in all probability unaware of plaintiffs' action, filed five days prior to the printing of the Report, which appears to be the only lawsuit actually pending at the time, use of the future tense cannot reasonably be construed as evidencing a Congressional intent to exclude such actions.

mechanisms for insuring relief to providers might be inadequate, it nevertheless concluded that forcing the states to waive their constitutional right to immunity was not the answer:

"HEW has responsibility to assure that States operate in compliance with the requirements of the Federal law. If the tools available to it currently are not sufficient to accomplish this, the Committee expects the Department of Health, Education and Welfare to request the changes in law that are needed. Nonetheless, the Committee is convinced that the urgent nature of the problems occasioned by the provisions of sec. 111 of Public Law 94-192 require immediate action to remove it from the law." Id. at 5.

Similarly, the Senate Report, S. Rep. No. 94-1240, 94th Cong., 2d Sess., September 16, 1976, leaves little doubt that the forced waiver of sovereign immunity, and not just the penalty for non-complying states, was a primary Congressional concern:

"[U]pon reconsideration of this matter, the Committee is unconvinced . . . of the desirability of compelling States to waive their constitutional immunity to suit or of the feasibility of assessing monetary sanctions against states failing to do so in a time of economic stringency at all government levels. For this reason, the Committee strongly recommends that the Senate act expeditiously in repealing this well-intentioned but, in retrospect, inappropriate legislation." Id. at 3-4 (Emphasis supplied).

The hospitals point to the statement in the Senate Report (p. 4) that the repealer is not intended to affect providers' rights to "prospective, injunctive relief." (Fl. Br., p. 37). Whether or not this was a "broad hint" to hospitals, as their brief asserts, it supports the decision of the District Court for it confirms that no right to pursue monetary relief against states was expected to survive the repealer.

In sum, the rationale for the repealer legislation, as clearly reflected in the legislative history, mandates the conclusion that the repealer applies to pending cases.

The hospitals' argument that the repealer statute does not affect pending cases would, as the District Court observed (J.A. 698-99), produce the anomalous result that Congress intended to penalize those states, like New York, that complied (albeit under protest) with the original consent-to-suit requirement while at the same time leaving non-complying states free of any potential liabilities. In fact, since this is the only known pending case affected by the repealer statute, the hospitals' argument in effect is that only New York among all the states of the Union must remain subject to the liabilities inherent in suits from which Congress has relieved all other states. It is certain, based on the terms

and history of the repealer legislation, that this was not what Congress intended by the repealer legislation.*/

HEW has recognized that by giving the repealer legislation in its entirety retroactive effect to January 1, 1976, Congress sought to restore the full Eleventh Amendment immunity as of that date to all states that had amended their Title XIX plans in accordance with the prior law. HEW's directive of October 28, 1976, to states that had executed waivers instructed them to remove the waivers from their plans effective as of January 1, 1976, a departure from general HEW practice of approving a plan amendment effective as of the calendar quarter when submitted. 45 C.F.R. § 205.5(b) (1974). **/

*/ Citing this Court's decision in Friends of the Earth v. Carey, 552 F.2d 25 (2d Cir. 1977), cert. denied, 46 U.S.L.W. 3261 (1977), the hospitals say there is no "anomaly" in federal legislation that penalizes states which comply with federal directives while rewarding those that refuse to do so. Friends of the Earth stands for no such principle. In that case (1) there was no "penalty" imposed on the complying state since, unlike many other states, New York chose to develop a state plan under the Clean Air Act, and never claimed that doing so infringed its interests in any way; and (2) the City of New York, which did claim to have been penalized, failed to raise its claim until four years after it had voluntarily undertaken to participate in the federal program, and was therefore found to have waived its right to protest. Here, New York complied only under protest with the forced waiver statute and it has consistently maintained its position that the statute was unconstitutional.

**/ The October 28, 1976, directive is reproduced in Appendix B.

3. Applicable Case Law

Even if the terms of the statute and the legislative history were not as clear as they are on the application of the repealer to pending cases, that result would be reached by virtue of the venerable doctrine that Congressional withdrawal of jurisdiction from federal courts applies not only to future but also to pending actions unless Congress specifically provides to the contrary, which it did not do in this case. The Supreme Court adopted this principle over 100 years ago in Insurance Co. v. Ritchie, 72 U.S. (5 Wall.) 541, 544 (1866):

"It is clear, that when the jurisdiction of a cause depends upon a statute the repeal of the statute takes away the jurisdiction."

The court reiterated this point in The Assessors v. Osbornes, 76 U.S. (9 Wall.) 567, 575 (1869):

"Jurisdiction in such cases was conferred by an act of Congress, and when that act of Congress was repealed the power to exercise such jurisdiction was withdrawn, and inasmuch as the repealing act contained no saving clause, all pending actions fell, as the jurisdiction depended entirely upon the act of Congress."

Repeatedly observed in other cases, this principle withstood the test of time and was reaffirmed by the Court in Bruner v. United States, 343 U.S. 112, 116-17 (1951):

"This rule -- that, when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law -- has been adhered to consistently by this Court."

And in De La Rama Steamship Co. v. United States, 344 U.S. 386, 390 (1953), the Court summarized the controlling rule of the law as follows:

"When the very purpose of Congress is to take away jurisdiction, of course it does not survive, even as to pending suits, unless expressly reserved. Ex parte McCardle, 7 Wall. 506, is the historic illustration of such a withdrawal of jurisdiction, of which less famous but equally clear examples are Hallowell v. Commons, 239 U.S. 506, and Bruner v. United States, 343 U.S. 112. If the aim is to destroy a tribunal or to take away cases from it, there is no basis for finding saving exceptions unless they are made explicit.*/"

In each of these cases, a statute withdrawing federal court jurisdiction has applied to a case pending, sometimes in an appellate court, when the statute was enacted. The hospitals cite no cases to the contrary.

*/ The same principle has been consistently applied in the circuit courts of appeals. See, e.g., Barthelemy v. J. Ray McDermott & Co., 537 F.2d 168, 171-73 (5th Cir. 1976); de Dampitan v. Administrator of Veterans' Affairs, 516 F.2d 708 (D.C. Cir. 1974); de Rodulfa v. United States, 461 F.2d 1240, 1247-55 (D.C. Cir.), cert. denied, 409 U.S. 949 (1972); Battaglia v. General Motors Corp., 169 F.2d 254, 259-61 (2d Cir.), cert. denied, 335 U.S. 387 (1948).

The principle that Congressional divestiture of federal jurisdiction applies to pending cases has been given effect where, as here, plaintiff has obtained monetary relief prior to the withdrawal of jurisdiction. As long as the judgment is not final through either appellate affirmance or the expiration of time for seeking review, the withdrawal of jurisdiction effectively nullifies the trial court's judgment. de Dampitan v. Administrator of Veterans' Affairs, 516 F.2d 708 (D.C. Cir. 1974); de Rodulfa v. United States, 461 F.2d 1240 (D.C. Cir.), cert. denied, 409 U.S. 949 (1972).

The District Court properly placed substantial reliance on the de Rodulfa decision, which, like this case, involved a terse statute that defeated jurisdiction retroactively. There, as here, the statute was applied to a pending case even though the statute did not in its terms mention pending cases. Plaintiffs seek to distinguish the case on the ground that there "the strong Congressional disapproval of the decisional law underlying those [pending] cases led to the logical conclusion that the pending litigation was encompassed by the amendment." (Pl. Br., p. 32). Even if this does explain the de Rodulfa decision, it does

not distinguish the present case, for here as well Congress' action was premised on its disapproval of the statute underlying the pending case.

Appellants also make the technical argument that this case does not involve strictly jurisdictional statutes since the initial consent-to-suit statute did not confer jurisdiction but merely required elimination of the state's immunity that otherwise would defeat the exercise of jurisdiction. (Pl. Br., pp. 32-33). The District Court gave short shrift to this argument (J.A. 700-701) and properly so. The Eleventh Amendment "is an explicit limitation of the judicial power of the United States." Missouri v. Fiske, 290 U.S. 18, 25 (1933). Whether this limitation is strictly "jurisdictional" or simply "sufficiently partakes of the nature of a jurisdictional bar" to divest a federal court of jurisdiction when the immunity is raised (Edelman v. Jordan, supra at 678), it clearly establishes substantial limitations on the power of federal courts to decide suits against states. Plaintiffs offer no reason why the principles applicable in "pure" jurisdictional statute cases should not be followed in Eleventh Amendment cases.

4. Appellants' Cases

In their brief to this Court, the hospitals for the first time rely on a series of cases said to establish

the proposition that the state's waiver of immunity was "voluntary" even though induced by federal statute backed by a fiscal sanction (Pl. Br., pp. 22-25) and that an immunity once waived "voluntarily" may not later be reasserted. (Pl. Br., pp. 26-29). We seriously doubt that the cases cited support the conclusion that the state's waiver of immunity in this case pursuant to a federal statutory requirement was voluntary. The Steward and Bekins cases are not pertinent to this question, for neither involved a federal requirement of state action to avoid a penalty or loss of benefits. In the Oklahoma case the Court treated the state's action as "coerced" but nonetheless sustained the federal requirement in issue. These cases do not undermine the District Court's conclusion in this case that the state's waiver was not "'voluntary' in the usual Constitutional sense." (J.A. 7).*/

*/ In both Steward Machine Co. v. Davis, 301 U.S. 548, 589 (1936), and United States v. Bekins, 304 U.S. 27 (1938), the Court noted that while claims of "coercion" had been raised by private plaintiffs, the states involved had made no such claim, and indeed, as the Court stated in the Steward case, the State "would be sorely disappointed if [the challenged state law] were to be annulled." 301 U.S. at 598.

(cont'd)

In any event, the hospitals' argument is beside the point. Whether or not New York's waiver of immunity was "voluntary" or "coerced," it is that waiver that the repealer legislation sought to undo. If the state's construction of the repealer statute as applying to pending cases is correct, it makes no difference how its earlier waiver is characterized. It is enough that the waiver in fact was the product of the repealed statute, which the District Court found (J.A. 689, 701) and the hospitals do not question.*/

(cont'd)

In *Oklahoma v. Civil Service Commission*, 330 U.S. 127 (1947), the state did claim that it was "coerced" into taking action by federal economic pressures. The Court did not hold the state's action to avoid a reduction in federal benefits was "voluntary," but rather that in administering federal grant programs, the federal government may impose restrictions having a "coercive effect" on participating states so long as in doing so the "means [employed] for the exercise of a granted power . . . are appropriate and plainly adapted to the permitted end." 330 U.S. at 143. Whether this rationale would justify against constitutional challenge the forced waiver of Eleventh Amendment immunity need not be addressed in this case.

*/ The hospitals' effort to analogize this case to those where states "move in and out of court, according to the vicissitudes of the litigation" (Pl. Br., p. 26) is particularly inapt. As the District Court held (J.A. 701) the state's actions both in executing the waiver and later withdrawing it were responsive to congressional enactments, not to developments in litigation.

The hospitals do not suggest that Congress is disabled by the Constitution from undoing the effect of a waiver of Eleventh Amendment immunity previously required by federal statute and no such contention could be seriously advanced. (Their constitutional contention that the repealer may not disturb an intervening non-final money judgment is considered in Part II below).

In short, the controlling consideration here is that Congress by statute determined that waivers previously executed pursuant to the mandate of federal law should be extinguished, and the cases cited by the hospitals neither deal with such a situation nor preclude the result intended by Congress. ^{*/}

5. "Manifest Injustice"

The hospitals argue that the Court should construe the repealer not to apply to this case in order to avoid

^{*/} Conceivably, a state might decide, notwithstanding the repealer, to maintain its waiver voluntarily. New York did not do so. Seasonably after receiving the directive from HEW, it amended its plan to withdraw the forced waiver. See Appendix B. The hospitals now contend that New York's failure to complete the amendment process prior to the District Court's November 9 decision amounted to a separate waiver of immunity (Pl. Br., p. 44). This ground was not advanced to the District Court, which therefore had no opportunity to make a finding that the timing of the state's plan amendment evidenced an intention voluntarily to waive its immunity. In any event, the contention is without merit on its face. See page 37 below.

"manifest injustice" to them. (Pl. Br., pp. 38-41). A variant of the argument is that the state should be estopped from relying upon the immunity that the repealer legislation intended be restored. (Pl. Br., pp. 49-53). These arguments rest on little more than the claim that if the repealer is held applicable to this case, the hospitals will lose the benefit of the prior monetary relief even though they "relied" on the state's waiver of immunity in bringing this suit in federal court.

The "manifest injustice" approach is inapt. As the District Court held (J.A. 714), that concept was advanced in Bradley v. Richmond School Board, 416 U.S. 696 (1974), as an aid in determining retroactivity of a law absent evidence of Congressional intention on the issue. It has no application where, as here, the statute by its terms is made retroactive.

Even if the "manifest injustice" concept were applicable, it would not help the hospitals, for their alleged "reliance" on the state's waiver of immunity, in the circumstances of this case, could not possibly sustain their argument. By the time their suit was filed they could not have been unaware of the substantial opposition to the forced waiver and the likelihood of Congressional repeal, especially when the House voted repeal just five

days after the complaint was filed. Their decision to continue their federal court suit was clearly taken with appreciation of the legal risks.

The foregoing also answers the hospitals' claim that the state is "estopped" from asserting immunity. Apart from the other frailties of this contention, the predicate for any estoppel must be reasonable reliance. As shown above, the hospitals could not have reasonably assumed that continued federal court jurisdiction over their case would be assured. Moreover, as in the Eden v. Board of Trustees case relied on by the hospitals (Pl. Br., pp. 50-51), estoppel requires some deliberate action by the estopped party designed to induce a change in position. Here, though the state executed the forced waiver, it immediately protested the validity of the federal requirement and maintained from the outset of the litigation that the forced waiver was unconstitutional. This is not the kind of "inducing" conduct that would sustain an estoppel.

A manifest injustice would arise in this case only if New York, alone among the states, were denied the benefits of the repealer statute. See page 21 above. In this connection, it should be observed that the repealer

legislation was not a technical enactment relating to the management of the court system that incidentally impacted on this case. Rather, it represented a serious and substantial policy judgment by the Congress that the federal courts should not award monetary relief as was granted to the hospitals in this case absent the willing consent of the state. That judgment was based on considerations underlying the administration of the Medicaid program as well as concerns about the constitutionality of the earlier forced waiver statute. It was an affirmation of the philosophy of Rothstein v. Wyman, 467 F.2d 226 (2d Cir. 1972), cert. denied, 411 U.S. 921 (1973), that the federal courts ought not be "requiring the state to expend its funds against its will." 467 F.2d at 235. Of all the states, New York with its well-publicized fiscal difficulties should be the last to be singled out for monetary exposure faced by no other state.

Finally, the hospitals cannot show any mistreatment by the state. Their claim for relief does not rest on any proof of underpayment but rather on the timing of the state's submission and HEW's approval of the 1976 payment formula. Since the hospitals were reimbursed for the year 1976 in accordance with a formula found by HEW to meet the "reasonable cost" standard of the Act, the only

evidence on the merits of the hospitals' reimbursement supports the reasonableness of the state's payments.^{*/} Certainly there is no "manifest injustice" in remitting the hospitals to whatever remedies they had prior to the forced waiver statute in the event they want to challenge their 1976 reimbursement.

B. There Has Been No "Judicial Waiver" of the State's Eleventh Amendment Immunity in This Action.

The hospitals argue here, as they did below, that there has been a "judicial waiver" of the state's Eleventh Amendment immunity as a result of (1) a statement made by an Assistant Attorney General in a conference before the District Court on July 28, 1976; and (2) the state defendants' agreement to pay interest on monies, if any, ultimately determined to be due retroactively. These contentions present issues of fact as to the intended meaning of the matters claimed to constitute waivers.

^{*/} The hospitals' claim that the level of reimbursement paid by the state has "seriously jeopardize[d] the hospitals' ability to delivery (sic) quality health care to the low-income and indigent citizens whom Medicaid was designed to protect" (Pl. Br., p. 38) is pure hyperbole. In the year and one-half during which this case has been pending, not one shred of proof has been offered that the approved 1976 rate formula has had this consequence.

Judge Lasker, to whom the statements were made and who is in the best position to judge their intended meaning, summarily rejected the hospitals' contentions and found that an intention to waive immunity was "inconceivable." (J.A. 702). This finding, the only one possible on the facts, is so clearly correct as to be dispositive. See Fed. R. Civ. P. 52(a).

The statement of the Assistant Attorney General quoted by the hospitals (Pl. Br., p. 11) went only to the future -- the period that would be covered by a prospective injunction entered by the court -- as the context makes clear. See J.A. 403. As Judge Lasker found, the statement had no application to the past period to which the Eleventh Amendment immunity would have applied but for the forced waiver statute and as to which the state was still claiming immunity. (J.A. 702).

The agreement to pay interest, as a condition to a further stay, applied only to payments covered by the order "if hereafter required to be paid" (J.A. 542-43) and was obviously not in terms nor intended to be a waiver of the immunity defense which the state was then vigorously maintaining.

Apart from the finding of no waiver by Judge Lasker, the statements relied on by the hospitals fall

far short of the standard for waiver of Eleventh Amendment immunity established by the Supreme Court. Such a waiver must rest on (1) a showing that the official involved is authorized to waive the state's immunity, and (2) an intention in fact to waive. Ford Motor Co. v. Department of the Treasury, 323 U.S. 459 (1945). Moreover, the waiver must be stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909), cited in Edelman v. Jordan, 415 U.S. 651, 673 (1974). That test has consistently been followed by this Court. See, e.g., Trotman v. Palisades Interstate Park Commission, 557 F.2d 35 (2d Cir. 1977); Rothstein v. Wyman, 467 F.2d 226 (2d Cir. 1972), cert. denied, 411 U.S. 921 (1973); Knight v. New York, 443 F.2d 415 (2d Cir. 1971).

We have shown that no such "express language" or "overwhelming implication" can be found in the statements cited by the hospitals. As for authority, it seems fairly clear that the Assistant Attorney General had no power under state law to waive the state's immunity from suit. The lower courts in New York have held that "the

Attorney General may not waive the state's immunity from any action." In re Woitasek, 179 Misc. 947, 958, 40 N.Y.S.2d 514, 515 (Sup. Ct. 1943). See also Seitz v. Messerschmitt, 117 App. Div. 401, 102 N.Y.S. 732, aff'd, 188 N.Y. 587, 81 N.E. 1175 (1907); Undritz v. State, 39 N.Y.S.2d 275, 277 (Ct. Cl. 1943); Ferro v. Lavine, 359 N.Y.S.2d 1012, 1015 (Sup. Ct. 1974), aff'd, 36 N.Y.S.2d 591, 46 App. Div. 313 ("The rule is well established that the State as sovereign is immune from suit of any kind except where it has specifically consented thereto by express constitutional or legislative enactment."); Glen v. Rockefeller, 307 N.Y.S.2d 46, 48 (Sup. Ct. 1970), aff'd, 313 N.Y.S.2d 938 ("It is fundamental that the State is immune from suit unless . . . such inherent immunity has been waived by the Legislature.") (Emphasis supplied).^{*/}

The state Court of Appeals has never sanctioned a waiver of immunity by a state official and its closest

^{*/} The lower court dicta to the contrary cited by the Hospitals (Pl. Br., pp. 45-46) are not persuasive. At best they suggest a possible difference of opinion among the lower state courts. They cannot substitute for clear waiver authority required by the Supreme Court to sustain an Eleventh Amendment waiver in federal court.

cases in point indicate that no such waiver would be permitted, particularly where, as here, the court is notified by the Attorney General of the immunity defense. See Buckles v. State, 221 N.Y. 418, 117 N.E. 811 (1917); Glassman v. Glassman, 309 N.Y. 436, 131 N.E.2d 721 (1956); Niagara Falls Power Co. v. White, 292 N.Y. 472, 55 N.E.2d 742 (1944); see also, New York Constitution Art. III, § 19; Art. VI, §§ 9, 18.^{*/}

The hospitals claim a waiver of immunity based on the failure to inform the District Court of the repealer statute until November 15, 1976, several days after the court's order holding that HEW approval could not be applied retroactively. (Pl. Br., p. 44). This was never advanced to the court below, which had no opportunity to make a finding, and thus cannot be pursued here. In any case, the record shows that the Assistant Attorney General advised the court of the repealer as soon as he learned of it. (J.A. 573-74). The fact that he did not learn sooner hardly meets the standards for "judicial waiver" applied by the Supreme Court and this Court.

^{*/} The hospitals chide the state for not raising the issue of authority to waive immunity until the brief to this Court in December 1976. (Pl. Br., p. 47). This is because it was not until December that the hospitals advanced the claim that there had been an earlier "judicial waiver" of immunity by the Assistant Attorney General.

II. WITHDRAWAL OF THE NON-FINAL ORDER
GRANTING MONETARY RELIEF DOES NOT
IMPAIR APPELLANTS' CONSTITUTIONALLY
PROTECTED RIGHTS.

As the District Court held, the hospitals possessed no vested right in the non-final August 2 order granting monetary relief nor any other constitutionally protected right^{*/} at the time Congress withdrew the forced waiver on which the jurisdiction of this case was predicated. Its conclusion that application of the repealer statute in this case was not unconstitutional was clearly correct. Furthermore, even if in some circumstances a non-final judgment could give rise to a constitutional claim, the hospitals' expectancy under the August 2 order in this particular case was far too slender to be of constitutional dimension.

A. The Hospitals Had No Constitutionally
Protected Property Right in The
August 2, 1976, Order.

The District Court's discussion of this issue is a thorough and convincing rationale for its conclusion

*/ The District Court rejected contentions that the hospitals had a constitutionally protected property interest and a contract right in the state's consent-to-suit. (J.A. 710-13). The hospitals appear to have abandoned those claims on this appeal.

that withdrawal of monetary relief does not impair the hospitals' constitutional rights. This section of the brief is intended to supplement the District Court's opinion and to provide the Court more extensive discussion and quotation from the principal cases.

The basis of the District Court's holding was that Congressional legislation can and should be given effect in pending cases, including cases where a plaintiff has previously secured a money judgment, since he acquires no vested right until the judgment has become final and unreviewable. (J.A. 710). Because the August 2 money judgment was pending and not final, it was subject to Congressional action the effect of which was to withdraw the court's jurisdiction and the non-final judgment predicated on that jurisdiction.

This principle was recognized and applied in de Dampitan v. Administrator of Veterans' Affairs, 516 F.2d 708 (D.C. Cir. 1974). There the district court had reversed the determinations of the Administrator of Veterans' Affairs and entered judgments bestowing veterans' benefits upon plaintiffs. While an appeal was pending Congress withdrew federal jurisdiction in such cases. Based on this action, the Court of Appeals vacated the judgments in their entirety and dismissed the appeals

for want of jurisdiction. In subsequently denying a petition for rehearing premised on a contention that the repealer statute could not be applied to that pending case where judgments had already been awarded, the Court explained its earlier holding:

"Since, in every phase of their operation, the judgments have always resided within the purview of these appeals, in none of their aspects did the judgment ever become final. And since [the amended statute precluding district court jurisdiction] intercepts all judgments to the extent they remain non-final, we vacated them completely." Id. at 711.

In reaching the decision in de Dampitan, the Court relied heavily on its extensively annotated opinion in the closely analogous case of de Rodulfa v. United States, 461 F.2d 1240 (D.C. Cir.), cert. denied, 409 U.S. 949 (1972). There, the withdrawal of federal court jurisdiction had occurred after money judgments for counsel fees had been secured and were pending appeal. The Court dealt expressly with the claim that the repealer could not constitutionally be applied to vacate the lower court's judgments. It said:

"There is hardly room for doubting that had Section 211(a) been so amended before these cases had run their course in the District

Court, it would have foreclosed any judgment favorable to the claimants. That the judgments antedated the amendment makes for no difference in result as to so much of the judgments as were brought here for review. Amended Section 211(a) is as much a dissolution of our jurisdiction as it was of the District Court's, and 'when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law' It is clear to us beyond peradventure that these appeals fell when Congress changed Section 211(a).

. . .

"We are, of course, mindful of holdings that a change of law does not retroactively affect a proceeding which has already been terminated by a final judgment prior to the change. As the Supreme Court has admonished, '[i]t is not within the power of a legislature to take away rights which have been once vested by a judgment.' For '[l]egislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgments, the power of the legislature to disturb the rights created thereby ceases.' It is evident, however, that these precedents have no application here since, owing to the instant appeals, the awards of counsel fees have never become final. Surely counsel had no immutable right to payment of compensation from government funds at any time prior to the entry of the judgments in the District Court. Nor did they acquire such a right merely by virtue of the District Court's awards, which appellants have made the object of these appeals. 'An appeal is not a new suit in the appellate court, but a continuation of the suit in the court below;' it is 'a proceeding in the original cause,' and as such 'is but a step toward the final adjudication of the original cause, which the law allows quite as much as its [sic] allows a defense in the first instance.' Thus 'the suit is pending until the appeal is disposed of,' and until disposition any judgment appealed from it is still sub judice. While so remaining, the portions of the judgments in these cases granting counsel fees were not investitures

of rights ipso facto unalterable by the legislature."*/ 461 F.2d at 1251, 1252-53.**/

The closest case in point in this Circuit supports the application of the repealer statute in the present situation. Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir.) (Swan, Hand and Chase, JJ., per Chase, J.), cert. denied, 335 U.S. 887 (1948) (cited by the District Court at J.A. 709-10), involved a provision of the newly enacted Portal-to-Portal Act which withdrew from the federal courts the power to grant overtime pay awards authorized by the Fair Labor Standards Act for work already performed. This statute was enacted while the case was pending in the district court but before the plaintiff's claim for a higher overtime rate was adjudicated. On the basis of the Act the case was dismissed. This Court affirmed, rejecting the contention that the Act was an invalid taking of property in violation of

*/ In the interest of brevity, we have omitted from this quotation the extensive citations supporting the Court's propositions.

**/ The holdings in de Dampitan and de Rodulfa may be contrasted with the decision in Daylo v. Administrator of Veterans' Affairs, 501 F.2d 811 (D.C. Cir. 1974), in which the Court of Appeals refused to upset a judgment that was final at the time of Congress' withdrawal of federal jurisdiction.

the Due Process Clause. Analyzing separately plaintiff's claim to the higher pay as a statutory right and as a contractual right, the Court concluded that under either possibility the statute was constitutional.

The Battaglia case is like this case in its important features. There, as here, an Act of Congress formed the basis of the plaintiffs' claim. There, as here, Congress altered the underlying statute in the belief that it went too far. There, the change was to undo the reach of the statute as interpreted by the Supreme Court. Here, the change was to undo a statutory action found on reflection to have been ill-advised. There, as here, the question was whether the subsequent limiting legislation could constitutionally be applied to those who had acted in the interim on the basis of the initial legislation. This Court had little difficulty in holding that the subsequent legislation could be so applied, even though the interim was of several years duration. The same result is dictated here, where the interim was very brief.

The District Court has adequately explained why McCullough v. Virginia, 172 U.S. 102 (1898), so heavily relied upon by the hospitals, does not control the result in this case. (J.A. 703-06). McCullough

was the latest in a long series of cases involving Virginia's efforts to frustrate bondholders from utilizing their coupons to pay state taxes, which use had been authorized by statute when the coupons were issued.^{*/} The Supreme Court had in case after case preserved the rights conferred by the authorizing statute. 172 U.S. at 106. In McCullough, in flagrant disregard of a quarter-century of decided cases, the Virginia Supreme Court held that the original authorizing statute was void. The Supreme Court reversed, finding that the state court decision violated the Impairment of Contract Clause.

The statute originally permitted the tendering of coupons in lieu of cash to satisfy tax levies. In 1882 the state legislature revoked this authority and required cash payment of taxes. But it did establish a judicial procedure by which coupons could be validated, in which event the holder was entitled to exchange them for a tax refund. This was declared to be the sole remedy of the couponholder. The Supreme Court sustained this action against an Impairment of Contract claim on

^{*/} Virginia's efforts to nullify these coupons were among the most extreme examples of the public debt repudiation movement in the post-Civil War period that led to the great expansion in federal court power over state action. See Warren, The Supreme Court in United States History, pp. 665-71 (1926).

the ground that it left the couponholders with an adequate and efficacious remedy for their contract right. Antoni v. Greenhow, 107 U.S. 769 (1882).

McCullough's suit was brought under this procedure. After he obtained a favorable judgment and while an appeal was pending, the legislature revoked the procedure. In the Supreme Court it was argued that this revocation amounted to a withdrawal of consent-to-suit, requiring that the case be dismissed. While the Supreme Court's rejection of this argument is stated in terms of the rights arising from the lower court's judgment (172 U.S. at 123-25), it seems clear that the Court treated the latest legislative action as another in the long line of efforts to "embarrass the couponholders in the exercise of the right granted by the funding act." 172 U.S. at 108. That this is the real import of McCullough is shown in the Supreme Court's decision four years later in Oshkosh Waterworks Co. v. Oshkosh, 187 U.S. 437, 439 (1903), where McCullough was cited for the proposition that a legislature "may modify or change existing remedies or prescribe new modes of procedure, without impairing the obligation of contracts, provided a substantial or efficacious remedy remains or is given, by means of which a party can enforce his rights under the contract."

The hospitals concede that McCullough in essence involved a state effort "to repudiate its legal obligations under an issue of bonds." (Pl. Br., p. 57). Their attempt to show the instant case similarly involves a state effort not merely to limit remedies but to extinguish rights is nonsense. This case involves no more than the elimination by the federal government of a special remedy, established less than one year pre-

The pre-existing legal rights of the hospitals unchanged; they remain free to employ remedies available to them before the forced waiver statute was enacted. They have repeatedly asserted that they would do so in state court and have already initiated a claim in the state Court of Claims for the period in issue in this case. (J.A. 675-76, 726-27). This case has nothing in common with the circumstances underlying McCullough.

McCullough is also inapposite because it did not deal with the power of Congress to control the jurisdiction of federal courts. The Supreme Court has repeatedly confirmed the plenary power of Congress to confer or withdraw federal court jurisdiction, even as to pending cases. ^{*/}

*/ The Second Circuit Court of Appeals has clearly distinguished between the power of states to restrict vested rights and the far broader power of the Congress, in the exercise of its enumerated powers, to impair private rights. Battaglia v. General Motors Corp., 169 F.2d 254, 261 (2d Cir.), cert. denied, 335 U.S. 887 (1948).

See, e.g., Lynch v. United States, 292 U.S. 571, 580-82 (1934) (Brandeis, J.), in which the Court held that while insurance policies issued by the government conferred rights protected by the Fifth Amendment, Congress could withdraw the consent to sue on the policies at any time, for a consent-to-suit is "not the grant of a property right protected by the Fifth Amendment." 292 U.S. at 581. In this connection, it must be remembered that the federal courts are courts of limited jurisdiction, which may be expanded or contracted by Congress as it sees fit. Only where the removal of federal court jurisdiction would be "part and parcel" of an extinguishment of vested rights would the removal present a constitutional question.

De La Rama Steamship Co. v. United States, 344 U.S. 386, 390 (1953). As shown, the hospitals make no claim that the repealer legislation extinguishes their rights, but rather have emphasized the availability of alternative remedies.

As the District Court observed, the more recent Supreme Court and lower court decisions are unanimous that the withdrawal of federal court jurisdiction must be given effect in pending cases no matter how far advanced the litigation. The most striking illustrations are found in the suits for recovery of additional wages that were pending

when Congress enacted the Portal-to-Portal Act, particularly 149 Madison Avenue Corp. v. Asselta, 331 U.S. 199 (1947). There, plaintiffs' judgment had been affirmed by the Supreme Court just prior to the statutory change. At defendants' request on petition for rehearing, the Supreme Court remanded to the District Court for further consideration in light of the new Act, and the District Court concluded that the new legislation could constitutionally be applied to modify or destroy plaintiffs' claims "at any time before they have been reduced to unreviewable final judgments." 79 F. Supp. 413, 415 (S.D.N.Y. 1948). It then continued:

"The plaintiffs' contention that the judgment which was entered in this court and affirmed by the Circuit Court and the Supreme Court established vested property rights protected by the Fifth Amendment of which they can not be deprived by congressional legislation can not be sustained. A complainant has not any vested right in the decree of the district court while it is subject to review. See American Steel Foundaries v. Tri-City Council, 257 U.S. 184, 201, 42 S. Ct. 72, 66 L.Ed. 189, 27 A.L.R. 360; Watts; [sic] Watts & Co. v. Unione Austriaca Navigazione Etc., 248 U.S. 9, 21, 39 S. Ct. 1, 63 L.Ed. 100, 3 A.L.R. 323; State of Louisiana ex rel. Folsom v. Mayor, Etc., of the City of New Orleans, 109 U.S. 285, 291, 3 S. Ct. 211, 27 L.Ed. 936; National Carloading Co. v. Phoenix-El Paso Express, 142 Tex. 141, 176 S.W.2d 564, 570, certiorari denied, 322 U.S. 747, 64 S. Ct. 1156, 88 L.Ed. 1578; Dinsmore v. Southern Express Co., 183 U.S. 115, 120, 22 S. Ct. 45, 46 L.Ed. 111. In Carpenter v. Wabash Ry. Co., 309 U.S.

23, 27, 60 S. Ct. 416, 418, 84 L.Ed. 558, the Supreme Court quoted with approval the statement of Chief Justice Marshall in *United States v. Schooner Peggy*, 1 Cranch 103, 110, 2 L.Ed. 49: 'It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied *** In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.'

"In *Guadalupe Barbosa Ferrer v. Waterman S.S. Corp.*, 1 Cir., 76 F. Supp. 601, it was specifically held that a judgment of the district court awarding overtime compensation under the Fair Labor Standards Act was not final in the sense that the plaintiffs acquired a vested right therein which could not be affected by subsequent enactment of the Portal-to-Portal Act.

"Had the Supreme Court concluded that the judgment of this court could not be affected by subsequent legislation, it is reasonable to believe that it would not have modified its affirmance of the judgment upon a timely motion made for such relief and would not have remanded the matter to this court for further proceedings, a practice also resorted to by it in *Alaska Juneau Gold Mining Co. v. Robertson*, 331 U.S. 793, 67 S. Ct. 1728, 91 L.Ed. 1821. See *Southern California Freight Lines v. Davis*, 9 Cir., [sic] 167 F.2d 708, 711; *Webster-Brinkley Co. v. Belfield*, 9 Cir., 166 F.2d 814." 79 F. Supp. at 415-16.

Courts of Appeals have followed the principle that subsequent Congressional legislation can constitutionally be given effect in pending cases, even where plaintiffs had previously secured money judgments. See, e.g., de Rodulfa v. United States, supra; Mirabal v. General Motors Acceptance Corporation, 537 F.2d 871 (7th Cir. 1976). In these cases McCullough v. Virginia was considered by the court but was not deemed to require the result here urged by plaintiffs. The analysis in the Mirabal case is especially appropriate. There, the Court of Appeals reduced a money judgment for plaintiffs based on Congressional amendments to the applicable statute subsequent to the entry of the judgment. Treating the constitutional question in issue here, the Court said:

"Although the law in this area is not particularly clear, what appears to this court dispositive of our question is the treatment of trial court judgments under the Fair Labor Standards Act with respect to the Portal to Portal Act, 29 U.S.C. §§ 251 et seq. This latter act was passed to bar enormous claims pending in the courts for overtime pay under what Congress believed to be an erroneous construction of the Fair Labor Standards Act. Although the effect of this act was to divest in the appellate courts many judgments for overtime wages already obtained in the trial courts, no court held this result impermissible. The Supreme Court twice remanded labor cases to the district court for consideration in light of the Portal to Portal Act, after having in

one already issued an opinion and in the other denied certiorari. See 149 Madison Avenue Corp. v. Asselta, 331 U.S. 795, 67 S. Ct. 1178, 91 L.Ed. 1432 (1947); Alaska Juneau Gold Mining Co. v. Robertson, 331 U.S. 793, 67 S. Ct. 1314, 91 L.Ed. 1839 (1947). In the courts of appeals judgments for overtime wages which had been rendered in the trial courts prior to passage of the act were reversed on numerous occasions. E.g., McCloskey & Co. v. Eckart, 464 F.2d 257 (5th Cir. 1947). For a full list of these cases see 3 A.L.R.2d 1097, 1162 (annotation on the Portal to Portal Act). In one of the most lucid opinions on the question, a district court held that reversal on appeal because of subsequent legislation was constitutional:

'Rights under the Fair Labor Standards Act came into existence only by virtue of an act of Congress. These rights did not exist at common law, nor were they established by the Constitution. Therefore, since these rights were created by Congress, they may be taken away in whole or in part, or altered, by Congress which established them at any time before they have ripened into final judgment [meaning a judgment upon which no further appeal can be taken].'

"Ferrer v. Waterman S.S. Corp., 76 F. Supp. 601, 603 (D.P.R. 1948).

"This reasoning seems persuasive in the present situation. Civil actions under the Truth in Lending Act are rights created by Congress. Congress can repeal, amend or modify these rights in any way it sees fit. Under reasoning that what

Congress giveth, Congress can taketh away, we hold that the amendments must be applied in deciding this appeal." 557 F.2d at 875-76 (Emphasis supplied).

The hospitals' final argument is an unsuccessful effort to draw an analogy between this case and United States v. Klein, 80 U.S. (13 Wall.) 128 (1872). There the Supreme Court declared unconstitutional an Act of Congress that sought to deprive the courts of jurisdiction over certain cases brought by former Confederate sympathizers to recover property confiscated during the Civil War where the claim had been granted by the Court of Claims. The case had nothing to do with the Due Process Clause. The Court based its decision on the Separation of Powers concept and on Article III of the Constitution, finding that the Congress had improperly sought to prescribe rules of decision within the exclusive domain of the judiciary. 80 U.S. at 146-47. That the hospitals should rely on this case shows the paucity of precedent for their claim that their constitutional rights under the Due Process Clause have been impaired.

B. Under the Circumstances of This Case No Substantial Constitutional Interest Can Be Advanced.

Due process is not a matter of form but of substance. Where the issue is whether plaintiffs' rights

have been impaired without due process, the courts must consider to what extent the rights asserted have substantial basis. In this case, even if the law were not as described above, the hospitals should not be entitled to assert a constitutional barrier to the Congressional repealer because at the time they secured their initial judgment the uncertain nature of the underlying law precluded the kind of expectancy that is entitled to constitutional protection against Congressional action, and because their right to retroactive relief was not fully determined until after the repealer statute was enacted.

The provision requiring waiver of Eleventh Amendment immunity was a last minute floor rider passed without Congressional deliberation. From the outset, it was highly controversial and widely opposed. Its constitutionality was questioned, and legislation was promptly introduced to repeal it. HEW supported repeal. Many states refused to execute the required waiver. See H.R. Rep. No. 94-1122, supra, at p. 4.

All this occurred prior to the filing of the initial complaint in this case. Within one week of that filing the House of Representatives passed the repealer legislation. 122 Cong. Rec. H4280 (daily ed. May 12, 1976).

The hospitals, who were undoubtedly aware of these events, took a calculated risk in filing and maintaining this action. While they might have hoped that Congress would take no further action, no knowledgeable observer could have failed to recognize by May 1976 the strong likelihood of Congressional withdrawal of the hastily adopted waiver provision. Now that the likelihood of a repeal has become a reality, the hospitals cannot claim that they were misled into filing this action, or that there has been that substantial impairment of their property rights that underlies any valid claim of constitutional deprivation. As the Supreme Court stated in Federal Housing Administration v. The Darlington, Inc., 358 U.S. 84, 91-92 (1958):

"The Constitution is concerned with practical, substantial rights, not with those that are unclear and gain hold by subtle and involved reasoning. Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end."

Appellants are in no better position than the landlords in Fleming v. Rhodes, 331 U.S. 100 (1947), who had secured a final judgment against their tenants shortly before the reenactment of price control legislation that had been anticipated generally. There, the Supreme Court

brushed aside claims that application of the controls would deprive plaintiffs of vested rights in their prior judgment, holding that "[s]o long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it." 331 U.S. at 107.

There is still another reason why the hospitals can assert no substantial constitutional interest to avoid the effect of the repealer legislation. The repealer became law on October 18, 1976, while the District Court was considering, pursuant to this Court's remand, the impact of the approval by HEW. The conclusion that HEW approval could not be given retroactive effect was not announced by the District Court until November 5, 1976. In short, the hospitals' right to retroactive relief was not fully determined until after the authority of the federal courts to grant retroactive relief had been extinguished.

In these circumstances, appellants can advance no viable constitutional contention. Had the repealer legislation been brought to the District Court's attention before November 5, it could not have decided the effect of the HEW approval, but instead would have had to dismiss the request for retroactive relief for want of jurisdiction.

The fact that the District Court was unaware when it issued its order that its jurisdiction had been undermined did not elevate the hospitals' interest to one of constitutional dimension free from subsequent correction of the judgment previously entered.

III. FULL RESTORATION TO THE STATE
OF FUNDS PAID PURSUANT TO THE
WITHDRAWN ORDER IS REQUIRED.

Following the District Court's November 9, 1976, order, the state was unsuccessful in securing a further stay pending appeal. (J.A. 607-622). Thus, it made the additional payments required by the order. After concluding, on remand, that the order must be withdrawn in light of the repealer legislation, the District Court ordered the hospitals to refund the amounts paid pursuant to the order. (J.A. 763). It is now claimed that the District Court instead should have permitted the hospitals, under a doctrine of "equitable restitution," to retain the funds paid notwithstanding vacation of the order. (Pl. Br., pp. 62-65).

The argument must fail because the District Court had no discretion to withhold the restoration order. Given the repealer legislation, the District Court was without jurisdiction over the state defendants. In such a case

the courts' only authority is to vacate previously entered orders, dismiss the proceeding, and enter such additional relief as will prevent the plaintiff from "obtain[ing] the full benefit of a judgment or decree rendered in his favor by a court which had no jurisdiction to hear and determine the controversy." Stickney v. Wilt, 90 U.S. (23 Wall.) 150, 162 (1874); Mail Company v. Flanders, 79 U.S. (12 Wall.) 130 (1870); Gully v. Interstate Natural Gas Co., 292 U.S. 16 (1933); United States v. Corrick, 298 U.S. 435 (1935).

In this case, to allow the hospitals to keep the money paid in compliance with the District Court's withdrawn orders would allow precisely the kind of assault on the state's treasury that was disavowed by Congress in the repealer legislation and is precluded by the Eleventh Amendment, the Supreme Court's decision in Edelman v. Jordan, 415 U.S. 651 (1974), and the holding of this Court in Rothstein v. Wyman, 467 F.2d 226 (1972), cert. denied, 411 U.S. 921 (1973). As the Court held in Edelman, regardless of the procedural label placed on the relief sought by plaintiffs, if it is "in practical effect indistinguishable . . . from an award of damages against the State," it is beyond the jurisdiction of the federal court to impose, and cannot be sustained. Id. at 688.

The hospitals' reliance on the "equitable restitution" doctrine is misplaced, for that concept of equity power derives from and is ancillary to the Court's basic jurisdiction in the case. Atlantic Coast Line Ry. Co. v. Florida, 295 U.S. 301, 314 (1934). That basic jurisdiction is lacking here.

Even if "equitable restitution were an available doctrine, it would not preclude restoration of the funds previously paid. The only contrary reason advanced is that the District Court found the state's pre-approval implementation of the 1976 formula to be "in blatant disregard" of the Medicaid Act. (Pl. Br., pp. 63-64). But at most this was an error of timing. HEW subsequently did approve the state's 1976 reimbursement plan as meeting the statutory test of reasonable cost reimbursement, and the hospitals were reimbursed for the entire year in accordance with that plan. Thus, there is no basis for concluding that the hospitals have been inequitably treated, and no ground for withholding restoration of the additional funds paid to the hospitals under the vacated orders.

CONCLUSION

This brief had dealt solely with the question whether the District Court was correct in vacating its

earlier orders granting monetary relief against the state. In the original appeal from those orders (No. 76-6117) the state preserved its objection on the merits to the District Court's decision, embodied in its order of November 9, 1976, that HEW's approval of the 1976 formula amendments could not be applied retroactively to January 1, 1976. See appellants' brief, pages 7-8.

But as pointed out there, that issue need not be resolved because resolution of the Eleventh Amendment issue in the state's favor disposes entirely of the matter. This is because HEW had fully approved all of the amendments in issue prior to the District Court's November 9 determination, so that the only live controversy at that time related to the award of retrospective monetary relief.

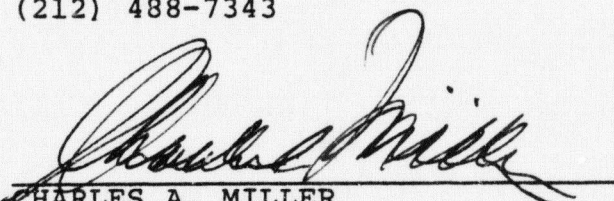
Accordingly, for the foregoing reasons as well as those set out in the District Court's opinion, the orders of August 15 and September 14, 1977, should be affirmed in their entirety.

There is another basis for affirmance. The state defendants argued below, as an alternative ground, that the relief granted in the August 2, and November 9, 1976, orders represented an improvident exercise of the Court's general equity jurisdiction within the doctrine of Rothstein v. Wyman, supra. The District Court had no

occasion to reach this issue because its determination of the Eleventh Amendment issues was dispositive. Extended argument of this alternative ground is unnecessary in light of the clear correctness of the District Court's decision. Accordingly, the state defendants rely on their argument on this alternative ground set forth at pages 24-31 of their Brief (filed December 30, 1976) and pages 10-12 of their Reply Brief (filed January 21, 1977) to this Court in the earlier appeal (No. 76-6117). To the extent necessary, these passages are incorporated into this brief.

Respectfully submitted,

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December 5, 1977

APPENDIX A

The following are material portions of the Federal Constitution and statutes which are relevant to the determination of the issues presented by this case.

1. The Eleventh Amendment of the United States Constitution:

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State.

2. Public Law 94-182, § 111, 89 Stat. 1054, December 31, 1975, amending 42 U.S.C. § 1396(a):

Sec. 111.(a) Section 1902 of the Social Security Act is amended by adding at the end thereof the following new subsection:

"(g) Notwithstanding any other provision of this title, a State plan for medical assistance must include a consent by the State to the exercise of the judicial power of the United States in any suit brought against the State or a State officer by or on behalf of any provider of services (as defined in section 1861(u)) with respect to the application of subsection (a)(13)(D) to services furnished under such plan after June 30, 1975, and a waiver by the State of any immunity from such a suit conferred by the 11th amendment to the Constitution or otherwise."

(b) Section 1903 of such Act is amended by adding at the end thereof the following new subsection:

"(1) Notwithstanding any other provision of this section, the amount payable to any State under this section with respect to any quarter beginning after December 31, 1975, shall be reduced by 10 per centum of the amount determined with respect to such quarter under the preceding provisions of this section if such State is found by the Secretary not to be in compliance with section 1902(g)."

(c) The amendments made by this section shall (except as otherwise provided therein) become effective January 1, 1976.

3. Public Law 94-552, 90 Stat. 2540, October 18,

1976:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That subsection (g) of section 1902 of the Social Security Act and subsection (1) of section 1903 of such Act are repealed.

Sec. 2. The amendments made by the first section shall take effect as of January 1, 1976.

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APPENDIX B

1. HEW "Action Memorandum" of October 28, 1976:

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL AND REHABILITATION SERVICE
WASHINGTON, D. C. 20201

PLAN PREPRINT

ACTION TRANSMITTAL
SRS-AT-76-163 (MSA)
October 28, 1976

TO: STATE AGENCIES ADMINISTERING MEDICAL ASSISTANCE PROGRAMS

SUBJECT: Title XIX, Social Security Act: Preprinted State Plan Amendment to Implement Repeal of State Consent to Suit Requirement

STATUTORY REFERENCES: P.L. 94-552, October 18, 1976, repealing section 111 of P.L. 94-182

ATTACHMENT: Revised page 24a of preprinted plan, with Item 4.26, State Consent to Suit, deleted.

EFFECTIVE DATE: The repeal is effective retroactively to January 1, 1976

ACTION REQUIRED: Only States whose approved plans now include the consent to suit provision (page 24a as transmitted by SRS-AT-76-14 (MSA), January 28, 1976) need submit the attached revised page. States which submitted such a page which has not been incorporated in the plan should withdraw it.

INQUIRIES TO: SRS Regional Commissioners



Commissioner
Medical Services Administration

2. HEW Approval of Deletion of State Consent-To-Suit

U.S. GOVERNMENT PRINTING OFFICE - 1974-663-212

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL AND REHABILITATION SERVICE
Washington, D. C. 20201

Submit 6 Copies

TRANSMITTAL AND NOTICE OF APPROVAL OF STATE PLAN MATERIAL
SOCIAL AND REHABILITATION SERVICE STATE PLAN PROGRAMS

TO: REGIONAL COMMISSIONER
SOCIAL AND REHABILITATION SERVICE
DEPARTMENT OF HEALTH, EDUCATION, & WELFARE
REGION II

TRANSMITTAL NUMBER

76-57

STATE

New York

PROGRAM IDENTIFICATION

XIX

PROPOSED EFFECTIVE DATE

January 1, 1976

TYPE OF PLAN MATERIAL (CHECK ONE)

☐ NEW STATE PLAN

☒ AMENDMENT TO BE CONSIDERED AS NEW PLAN
AMENDMENT

DELETE NEXT BLOCK IF THIS IS AN AMENDMENT (Separate transmittal for each amendment)

FEDERAL REGISTRATION CITATION

N.L. 94-582

NUMBER OF THE PLAN SECTION OR ATTACHMENT

Page 24a

NUMBER OF THE SUPERSEDED PLAN SECTION OR
ATTACHMENT

Page 24a

IF AMENDMENT

State Consent to Suit - Section 4.28 - deleted.

GOVERNOR'S REVIEW (CHECK ONE)

☐ GOVERNOR'S OFFICE REPORTED NO COMMENT

☒ OTHER, AS SPECIFIED:

☒ COMMENTS OF GOVERNOR'S OFFICE ENCLOSED

☐ NO REPLY RECEIVED WITHIN 45 DAYS OF SUBMITTAL

SIGNATURE OF STATE AGENCY OFFICIAL

NAME

Philip L. Toia

TITLE

Commissioner

December 7, 1976

FOR REGIONAL OFFICE USE ONLY

DATE RECEIVED

DEC 8 1976

DATE APPROVED

DEC 8 1976

PLAN APPROVED - ONE COPY ATTACHED

EFFECTIVE DATE OF APPROVED MATERIAL

SIGNATURE OF REGIONAL OFFICIAL

TYPED

NAME: William Toby

TITLE:

Acting Regional Commissioner

REMARKS

TURN TO: NYS Department of Social Services
1450 Western Avenue
Albany, New York 12243

Revision: SRS-111
October 1960

State New York

Citation
45 CFR
250.70
P.R. 40-36

4.27 Disclosure of Information on Providers
of Health Care Services and Contractors.

The State agency has established procedures for disclosure of information on providers of services, contractors, carriers, intermediaries and State agencies. Those procedures meet all requirements of 45 CFR 250.70.

145011

PHILIP L. TOIA
COMMISSIONER

December 7, 1976

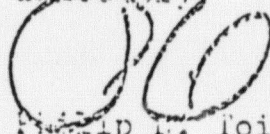
Dear Bill:

Enclosed is a revised page 24-a for insertion in the New York Title XIX State Plan.

This revised page is submitted pursuant to Action Transmittal SRS-AT-76-163(MSA) and Public Law 94-552, dated October 18, 1976, which repealed, effective January 1, 1976, legislation requiring "State Consent to Suit" Plan provisions. Such a provision was added to this State's Title XIX Plan, under protest by the State, on March 31, 1976. In view of the subsequent legislation and the Action Transmittal implementing that legislation, the "Consent to Suit" provision in the State Plan is of no effect since it was based entirely on federal legislation which has been repealed effective at the beginning of this year.

It does not appear from the Action Transmittal whether any formal HEW action on the submission, such as approval or confirmation of receipt of the Plan revisions, is contemplated. Notwithstanding that, the State would appreciate your prompt acknowledgement of receipt of the enclosed and confirmation of the State's understanding of the effect of this submission.

Sincerely,



Philip L. Toia

Mr. William Toby
Acting Regional Commissioner
Department of Health, Education,
and Welfare
Region II
26 Federal Plaza
New York, New York 10007

cc'd 7/15 12/15

COVINGTON & BURLING

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United States Court of Appeals
for the Second Circuit
Room 1903
United States Courthouse
Foley Square
New York, New York 10007

Re: Hospital Association of New York State,
Inc., et al. v. Philip L. Toia, et al.,
Nos. 77-6152 and 77-6174

Dear Sir:

Enclosed for filing are twenty-five copies
of the State Defendants-Appellees briefs in Civil
Appeal Nos. 77-6152 and 77-6174. Copies of the fore-
going have been served by hand on Appellants' counsel:

Jacob Imberman, Esq.
Proskauer Rose Goetz & Mendelsohn
300 Park Avenue
New York, New York 10022

and by counsel for other parties appearing below:

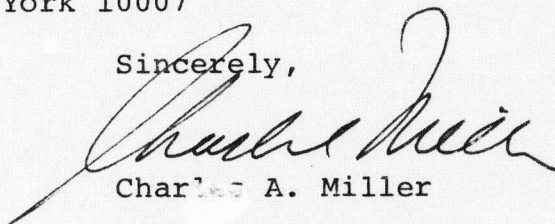
Peter F. Nadel, Esq.
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COVINGTON & BURLING

United States Court of Appeals
for the Second Circuit
December 5, 1977
Page Two

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United States Courthouse, Annex
One St. Andrews Plaza
New York, New York 10007

Sincerely,

A handwritten signature in dark ink, appearing to read "Charles A. Miller", is written over the typed name. The signature is fluid and cursive, with a large initial "C" and "M".

Charles A. Miller

mb
Enclosures